

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PAUL PAYNE,

Petitioner,

v.

CIV 07-1017 MCA/KBM

TIM LeMASTER, Warden, et al.,

Respondents.

**ORDER ADOPTING MAGISTRATE JUDGE'S
PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

The Magistrate Judge filed preliminary proposed findings on January 29, 2008. She recommended that the § 2254 petition be found timely and exhausted and the record be expanded. *See Doc. 19*. Both parties filed objections.

Respondents object to the Magistrate Judge's request that the record be expanded. *Doc. 20*. In particular, Respondents take issue with her noted preference that the tapes of the proceedings be transcribed. *See id.* at 8 (indicating that the Court has authority under the habeas rules to order such transcription). As the Magistrate Judge observed, the post-conviction decision subject to review under AEDPA standards did not address the claims in any detail and incorporated

other materials that are not in the federal record. *Doc. 19* at 7-8. Because Petitioner challenges the findings on appeal as erroneous, *see Doc. 21* at 1, I agree that expansion of the record is appropriate. I therefore overrule the objection to expand the record. For the reasons set out by Respondents in their objections, however, I will not order transcription of any as yet untranscribed tapes at this juncture.

Neither of Petitioner's "objections" go to the merits of the recommendations. Petitioner's first "objection" regards a tangential matter as far as this habeas action is concerned. *See Docs. 17 & 19*. I am sure the Magistrate Judge will clarify the matter, if necessary, after a review of the entire record. *See Doc. 19* at 6-7; *Doc. 22* at 1. Petitioner's second "objection" merely

reserves the right to object [if] Respondents don't [provide] all the records [requested by this Court since] it would be a total injustice to permit the Respondents to pick and choose what hearings or excerpts the Court will review or to exclude those hearings or excerpts that validate Petitioner's claims especially where the trial judge told Petitioner that the proper venue to wage an ineffective assistance claim was the writ of habeas corpus which belies the lower court's position.

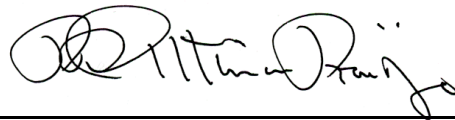
Doc. 22 at 1-2.

Wherefore,

IT IS HEREBY ORDERED AS FOLLOWS:

1. Respondents' objections (*Doc. 20*) are OVERRULED IN PART and GRANTED IN PART;
2. Petitioner's "objections" (*Doc. 22*) are OVERRULED;
3. The Magistrate Judge's Proposed Findings and Recommended Disposition (*Doc. 19*) is ADOPTED;
4. Respondents' shall expand the record by filing: the state "record proper;" all transcripts or tapes of pretrial, trial, and post-trial proceedings; tape logs if tapes are provided; pretrial and trial exhibits that are particularly pertinent to the resolution of the federal claims; and any other materials desired;
5. Petitioner may supplement the record with other supporting materials not already submitted with his other pleadings – **Petitioner may not duplicate items already submitted;**
6. The above additional materials shall be submitted by Monday, April 25, 2008.

SO ORDERED this 19th day of March, 2008.



M. CHRISTINA ARMIJO
UNITED STATES DISTRICT JUDGE